



July 28, 2000

Mr. Chris Borunda
Assistant City Attorney
Office of The City Attorney
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2000-2865

Dear Mr. Borunda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137679.

The City of El Paso (the "city") received a request for all data related to a particular individual's assessment for the position of director of the city's library system. The request included twelve items of information. You state that the city has released the documents responsive to item numbers 1-7, 10, 11, and 13. You assert that no responsive documents exist for item number 8. You claim that the responsive information for item numbers 9 and 12 is excepted from disclosure under section 552.122 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Before considering whether section 552.122 excepts the responsive information from public disclosure, we will address your assertion that no documents exist pertaining to item number 8 of the request. The Public Information Act (the "Act") does not require a governmental body to prepare new information in response to open records requests. Open Records Decisions Nos. 452 (1986), 342 (1982). Furthermore, the Act does not ordinarily require a governmental body to obtain new information to comply with a request. Open Records Decision No. 561 (1990). The Act only applies to information already in existence. In this instance, it appears the city does not have the requested information. Therefore, the city need not create any new documents to respond to the open records request for item 8.

Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass

evaluations of an employee's overall job performance or suitability. Whether information falls within section 552.122 must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976).

You state that the testing by the assessors is conducted to determine how the applicant "thinks on his/her feet." You state that the testing is conducted to determine whether the individual possesses the necessary fitness to become the library director. Having reviewed the submitted responsive information and your arguments, we find that only the two questions that appear to accompany the "Oral Presentation" portion of the interview represent "test items" under section 552.122(b) of the Government Code. Because the answers tend to reveal the questions, the city may withhold the submitted questions, and the actual answers under section 552.122(b). *See* Open Records Decision 626 at 8 (1994) (when answers to test questions might reveal the questions themselves, the information may be withheld under section 552.122); Attorney General Opinion JM-640 at 3 (1987). We conclude that the remainder of questions at issue are not "test items" as contemplated by section 552.122(b). The material "does not involve an evaluation of an applicant's knowledge in a particular area." ORD 626 at 8. Instead, we find that these questions assess the individual's suitability for the position of director of the city's library system. Therefore, you may withhold the two questions asked during the "Oral Presentation" portion of the interview and the accompanying answers. The city must release the remaining questions, answers, and accompanying notes, item 9, to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

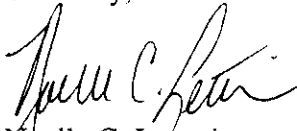
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Noelle C. Letteri
Assistant Attorney General
Open Records Division

NCL/pr

Ref: ID# 137679

Encl. Submitted documents

cc: Mr. Antonio V. Silva P.C.
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(w/o enclosures)